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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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INDEX

TABLE OF CONTENTS

Page

Jurisdictional Statement 1

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Statutes and Constitutional Provisions Involved 3

Statement 3

The Question Is Substantial 9

Conclusion 41

Appendix A A.1

Appendix B . . . . . A. 18

Appendix C . . . . . A. 19

TABLE OF CITATIONS

Cases

Alexander v. Virginia, 408 U.S. 921 (1972) 5

Art Theatre Guild, Inc. v. Rhodes, 469 S.W. 2d 669 (Tenn. 1971) 41

Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963) 18,21,22,32

Blount v. Rizzi, 400 U.S. 410, 416, 417 (1971) 17,21,26,42

Boyle v. Landry, 401 U.S. 79 (1971) 9

Page

Byrne v. Karalexis, 401 U.S. 216 (1971) 9
Carroll v. Princess Anne, 393 U.S. 175, 181 (1968) 22
Dyson v. Stein, 401 U.S. 200 (1971) 9
Evans Theatre Corp. v. Slaton, 227 Ga. 377 (1971) 20,40
For Adults Only, Inc. v. State ex rel. Gerstein, 257 So.2d 912 (1972) 41
Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L. Ed.2d 649 (1965) 17,31,32
Gable v. Jenkins, N.D. Ga. 1969, 309 F. Supp. 998, 397 U.S. 592 (1970) 12
Gibson v. Berry Hill, 41 L. W. 4576 (5-7-73) 16,17,18
Hobbs v. Thompson, 448 F.2d 456, 470 (1971) 24
Kingsley Books, Inc. v. Brown, 354 U.S. 436, 437 (1957) 12,17,26,32,34,42
Lake Carriers Assoc. v. MacMillan, 406 U.S. 498 (1972) 14,15
Leary v. United States, 395 U.S. 1532 5
Manual Enterprises, Inc. v. Day, 370 U.S. 478 27
Marcus v. Search Warrant, 367 U.S. 717, 731 (1961) 34,35,37
McKinney v. Alabama, 254 So. 2d 714 (1971) 40
Marks v. City of Newport, Ky., ___ S.W.2d ___ (1972) 41
Meyer v. Austin, 319 F. Supp. 457 (1970) 17,41
Mitchum v. Fla., ex rel Schaub, 250 So.2d 883 (1971) 41
Mitchum v. Fla., 251 So. 2d 298 (1972) 32,33,42
Mitchum v. Foster, 407 U.S. 225 (1972) 13
Near v. Minnesota, 283 U.S. 697, (1931) 5,22,26,27,28,33,35,42
New Riviera Art Theatre v. State, 412 S.W.2d 890 (Tenn. 1967) 30,32,42
New York Times Co. v. United States, 403 U.S. 713 (1971) 5
1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 S.E.2d 144 12

	Page
Organization for a Better Austin 402 U.S. 415 (1971)	
Palaio v. McAuliffe, 456 F.2d 1 Cir. 1972)	v. Keefe, 5,22,38,42
Paris Adult Theater v. Slaton, 4 (1972)	30 (5th 7,9,10,11
Paris Follies, Inc. v. State ex rel 259 So.2d 532	8 U.S. 921 5,12,17,20,40,42
Perez v. Ledesma, 401 U.S. 82	Gerstein,
Pursue, Ltd. v. Huffman, ———	41
Redrup v. New York, 386 U.S.	1971) 9,15
Roth v. United States, 354 U.S	F. Supp. 19,29,38
(1957)	767 (1967) 36
Samuels v. Machell, 401 U.S. 6	476, 488
Shelton v. Tucker, 364 U.S. 47	24,38
Smith v. California, 361 U.S. 1	(1971) 9,15,42
Speiser v. Randall, 357 U.S. 51	, 488 (1960) 23
State ex rel Keating v. "Vixen"	7 (1959) 32
137	3, 525 (1958) 22,25,32
State of Indiana ex rel Thomas Mohney Enterprises, et al.,	272 N.E.2d
519 (1972)	 40
Steffel v. Thompson, No. 72-5 Feb. 26, 1973	J. Blee v. 289 N.E.2d 37
Summerfield v. Sunshine Book 169, 221 F.2d 42	81, cert. granted
Thomas v. Collins, 323 U.S. 5	 9
315, 89 L. Ed. 430 (1945	Co. 95 App. D.C.
United States v. Congress of I	 29
Organizations, 335 U.S. 1	6, 530, 65 S. Ct.
1349, 92 L. Ed. 1849 (19	 24
United States v. Crowthers, 4	dustrial
1080	6, 68 S. Ct.
Walter v. Slaton, 227 Ga. 676	8) 23
(1971)	6 F.2d 1074,
Younger v. Harris, 401 U.S. 3	 23,24
(1971)	
	 20
	 9,10,11,13,14,15,16,42

Statutes Page

18 U.S.C.§ 1461 27
28 U.S.C. §2283 13
28 U.S.C. §§1253 and 2101(b) 2
28 U.S.C. § 1343(3) 2
28 U.S.C. §§2281 and 2284 2,4
42 U.S.C. §1983 2,13,19
Ga. Code Ann. §26-2101 3,4,7
Ga. Code Ann. §26-2103 3,4,5
Ga. Code Ann. §26-2104 3,4
Ind. Ann. Stat. §2-505 37
N.Y. Code of Crim. Procedure §22-a 12
Ohio Rev. Code §3767.01 19
Tenn. Code Ann. §39-3007 30
Title 72, Code of Georgia of 1933,
as amended 3,4,5,6

Constitutional Provisions

First Amendment 21,32,38,40,41
Fifth Amendment 32
Fourteenth Amendment 32,41

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LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of Georgia, Atlanta

Division, entered on February 22, 1973, denying Appellants' application for preliminary and permanent injunction and dismissing the Complaint and Petition for Injunction and Declaratory Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is not yet reported. A copy of the Opinion and Order of the three-judge court by District Judge Moye; of the concurring opinion of District Judge O'Kelley; and of the dissenting opinion of Circuit Judge Morgan are attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1343(3) based on a cause of action under 42 U.S.C. § 1983. A three-judge court was requested to be convened pursuant to 28 U.S.C. §§2281 and 2284 to enjoin the use by Appellees of certain Georgia statues as unconstitutional. The Opinion and Order of the three-judge district court was entered on February 22, 1973. Notice of appeal was filed in that court on March 26, 1973. The Notice of Appeal is attached hereto as Appendix B. The jurisdiction of the Supreme Court to review the decision of the district court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

Whether the *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Machell*, 401 U.S. 66 (1971) requirements for injunctive and declaratory relief were correctly applied where there was no criminal proceeding pending in the state court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345), and 26-2104 (Ga.L. 1971, pp. 344-345) and Title 72, Georgia Code of 1933, as amended, are attached hereto, along with pertinent provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States as Appendix C.

STATEMENT

On August 21, 1972, Appellees instituted an action in the Superior Court of Fulton County, Georgia, seeking to obtain temporary and permanent injunctions against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., Atlanta, Georgia, by any person and an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed. A Rule Nisi was issued requiring Appellants to show cause before his Honor, Judge Claude D. Shaw, at 9:30 a.m. on August 25, 1972, then and there to be heard, why the prayers of the complaint should not be granted.

On the date set for hearing a removal action was filed in the United States District Court for the Northern District of Georgia thereby divesting the Fulton Superior Court of jurisdiction. Subsequently, Appellants filed the instant complaint for preliminary and permanent injunctions against the further use of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345) and 26-2104 (Ga.L. 1971, pp. 344-345) as well as Georgia's Nuisance statutes, Title 72, Georgia Code of 1933, as amended, and declaratory judgments as to their unconstitutionality as written and as applied or threatened to be applied against Appellants. The requisite three-judge court was requested pursuant to 28 U.S.C. §§2281 and 2284.

The single District Judge to whom the case was referred stayed his ruling on the Appellees' motion to remand in the removal action pending a decision by the three-judge panel.

The Appellees sought to utilize a Georgia statute, Ga. Code Ann. §26-2103, which declared that the use of any premises in violation of any of the provisions of Chapter 26-21 of the Criminal Code of Georgia shall constitute a public nuisance. Chapter 26-21 is the portion of the Georgia Code dealing with the distribution of obscene materials. Georgia Code Ann. §26-2104 was also invoked by Appellees. That section declares that any materials declared to be obscene by the provisions of Chapter 26-21 and advertisements for such materials are contraband.

The statutory provisions of Ga. Code Ann. §26-2101 were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds and because they did not limit prosecutions to the sale of materials without notice to

the public of their nature or without reasonable protection against exposure of the materials to juveniles. *Cf. Alexander v. Virginia*, certiorari granted, 408 U.S. 921 (1972), argument heard October 19, 1972, and *Paris Adult Theater v. Slaton*, certiorari granted 408 U.S. 921 (1972), argument heard October 19, 1972.

Georgia Code Ann. §26-2103 and Title 72 of the Georgia Code of 1933 as amended, were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the First Amendment of a kind condemned by the Supreme Court in an unbroken line of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and others. Georgia Code Ann. §26-2103 was also attacked as denying due process and equal protection in that the statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 1532. It was further attacked as denying Fifth and Fourteenth Amendment rights to have every element making up a nuisance to be proven by competent evidence, in a First Amendment context, beyond a reasonable doubt.

The state court action was brought by the District Attorney of the Atlanta Judicial Circuit pursuant to authority granted him in Title 72, Georgia Code of 1933 to institute proceedings to abate a continuing public nuisance. The Solicitor of the Criminal Court of Fulton County joined the state court action as a plaintiff and is an Appellee herein even though no statutory or other authority exists for the Solicitor to act for the public to abate a nuisance.

The Harem Book Store, operated by Appellant Speight on premises leased to Appellant Chandler, is located at 2979 Campbellton Road, S.W., Atlanta, Georgia, on property zoned C-2 commercial; a classification which includes a retail bookstore. The Harem Book Store is engaged in the sale and offering for sale of books, magazines, newspapers, movie films, and other materials which are presumptively protected under the First Amendment to the Constitution of the United States, pursuant to applicable City of Atlanta business licenses.

The publications offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or materials distributed by the Harem Book Store, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

No persons have been convicted for distributing obscene materials upon the premises of the Harem Book Store. The trial of one employee on such charges resulted in a mistrial when the jury was unable to reach a verdict. No publication sold or offered for sale at the Harem Book Store has been adjudicated obscene.

At the hearing on Appellants' Motion for a Preliminary and Permanent Injunction several publications which had been purchased by adult agents of the Solicitor's office were tendered into evidence and were ruled inadmissible. Some of these were those upon which a conviction could not be obtained in the earlier criminal prosecution.

The three-judge panel produced three opinions. The two District Judges rules that the propriety of federal intervention in these circumstances has been decided by the Fifth Circuit Court of Appeals in *Palio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The concurring opinion of District Judge O'Kelley stated that, in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

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[1] Bad faith was alleged by Appellants and facts supporting that allegation were presented. Paragraphs 18 through 20 of the Complaint read as follows:

"18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: Georgia Code §26-2101, has been

Circuit Judge Morgan dissented, having found the statutes herein involved susceptible to no saving construction and

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(Footnote 1 Continued)

alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit 'A'.

"Further, Plaintiffs, affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servants, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to one (1) in favor of acquittal.)

"19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> 'Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.' (Exhibit "A", p. 3)

and rejecting the "civil proceeding used to enforce criminal laws" rationale of *Palaio v. McAuliffe*, supra.

The majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases,[2] as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the action was dismissed and this appeal follows.

THE QUESTION IS SUBSTANTIAL

The question presented herein is virtually identical with that presented in *Steffel v. Thompson*, No. 72-5581, certiorari

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(Footnote 1 Continued)
Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

"20.

Said attempt is, in truth and fact, a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected. (See paragraph 4 of the Complaint attached as Exhibit "A".)"

[2] *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 79 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

granted, February 26, 1973. It raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not decided by *Younger v. Harris, supra,* which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Steward in *Younger v. Harris,* 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court, while recognizing explicitly the fact that *Younger v. Harris, supra,* and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe,* 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*"

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144.

The Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins*, N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Unlike New York, Georgia has no civil statutes dealing with obscenity. Section 22-a of the New York Code of Criminal Procedure was upheld because it did have procedural safeguards. The Georgia procedure has none and is presently under review by this court in *Paris Adult Theatre v. Slaton*, No. 71-1051, certiorari granted 408 U.S. 921, argument heard, October 19, 1972.

In a case similar to this one, decided after *Younger v. Harris, supra,* and its companions, this Court ruled that 42 U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster,* 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

The majority of the three-judge court cited the above language but it is doubtful that this court would have reached the 42 U.S.C. §1983 issue, after its ruling in *Younger,* had it not thought intervention might be appropriate if the Anti-Injunction statute did not present an absolute bar.

As pointed out by Circuit Judge Morgan, in his dissent, civil proceedings result in the loss of certain protections which are available in a criminal proceeding. Among these are trial by jury and proof beyond a reasonable doubt, to name but two.

Assuming, *arguendo,* that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra,* is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra,* "significantly affect a state's enforcement–by whatever means–of its criminal laws." 466 F.2d 1230 at 1233. The

pending criminal prosecutions will remain pending no matter what the disposition of this case. The instant case cannot be characterized as civil enforcement of criminal laws because the relief requested by Appellees is not authorized by either civil or criminal or statutory or case law. Appellees' complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and
>
> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided,*inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. 498 at_____. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a justiciable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at _____

The separate opinion referred to in that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Machell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra*.

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, 41 L.W. 4576 (5-7-73). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending

actions is applicable here.

This Court unanimously held that the predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issued involved." 41 L.W. 4580. A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it. 41 L.W. 4581.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

There are absolutely no procedural safeguards surrounding the civil adjudication of materials as obscene in Georgia. This Court has before it, in *Paris Adult Theatre v. Slaton*, No. 71-1051, certiorari granted, 408 U.S. 921, argument heard October 19, 1972, a challenge to *ad hoc* procedures of the State of Georgia relating to obscenity.

A Florida statute authorizing the suppression of materials as obscene on nuisance grounds has been invalidated by a three-judge court because it lacked the procedural safeguards this Court has required. *Meyer v. Austin*, 319 F.Supp. 457 (1970), appeal pending *sub nom. Austin v. Meyer*, No. 70-35, stay vacated June 26, 1972, _____ U.S. _____. Specifically, Appellants herein are not entitled to a prompt decision by either case or statute law in Georgia. The issues do not need to be "timely decided." The trial court can take its time but even after a decision by it the appellate courts of Georgia are not required to rule within any given time. This is contrary to the holdings of this Court in *Freedman v. Maryland*, 380 U.S. 51; *Blount v. Rizzi*, 400 U.S. 410; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) and others.

Under Georgia law injunction cases are exempt from the automatic supersedeas provisions of §8 of the Appellate Practice Act of 1965. The burden rests upon the appellant to obtain such order, pursuant to §62(c) of the Civil Practice Act (Georgia Code Ann. §81A-162(c)) to obtain such order as will protect his rights and preserve the status quo during the pendency of the appeal. *Howard v. Smith*, 226 Ga. 850 (1970). The provision of the Civil Practice Act referred to above provides, in pertinent part, that when an appeal is taken from an interlocutory or final judgment granting an injunction, the court in its discretion may suspend the injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. §81A-162(c).

This means that a prior restraint either in the form of a bond "or otherwise" or closure of the bookstore pending appeal is expressly authorized by Georgia law pending an appeal. Equally obvious is the potentially prohibitive cost of an appeal and the resulting tendency to self-censorship lest an entire business be lost because one volume of a book or one issue of a magazine may trigger nuisance abatement proceedings. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra*, in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court

in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing

the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

5. There is no remedy available to Appellants in the state courts of Georgia. The majority opinion points out that "plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts." This is true. It is also true that the decisions of the Supreme Court of Georgia have already approved the use of the public nuisance approach to the regulation of "obscene" materials. In *Evans Theatre Corporation v. Slaton,* 227 Ga. 377 (1971) the Supreme Court of Georgia held that

> "the State has an interest in the welfare, peace and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws." 227 Ga. 377 at 382.

See also, *Paris Adult Theatre v. Slaton,* 228 Ga. 343 (1971), certiorari granted, 408 U.S. 921 and argument heard October 19, 1972, and *Walter v. Slaton,* 227 Ga. 676 (1971). The decision in *Evans Theatre Corporation v. Slaton, supra,* was prior to the passage of the legislation relied upon by the Appellees who admitted at oral argument that the challenged Code section was drafted with reliance upon that case. There is no reason to believe that the Supreme Court of Georgia will not authorize under a statute what it approved in the absence of one.

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees Slaton and McAuliffe, in their Complaint to close the Harem Book Store as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the conduct and operation of the Harem Book Store.

However, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . . '. *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963)." *Blount v. Rizzi*, 400 U.S. 410, 416, 417 (1971).

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees Slaton and McAuliffe, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the Harem Book Store, by closing its doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the

> publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Atlanta and Fulton County is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

The proposed injunction, it should be noted, does not enjoin the sale or distribution of "obscene" materials; instead, by closing the store, it enjoins the sale of any materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments.* First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall,* 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

> "In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C.* §*1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of §*1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending §*1461*, and enacting a second banning material with obscene matter on its face and – unlike §*1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter." (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

The most recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____

(No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State*, 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or

permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

> "The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

> "The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.
>
> "Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."
>
> "The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

> "We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

> "ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . . "

The Court condemned this order succintly and directly:

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

> "ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

> "This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

> "Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

> material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra,* to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

> "28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625." *Marcus v. Search Warrant, supra,* at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra,* and the Missouri procedure which are also relevant to the Georgia procedure:

> "*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunction would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendants herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek, not a determination that certain named publications are obscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees Slaton and McAuliffe are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Harem Book Store without regard to its effect upon protected speech and the rights of the citizens of Georgia and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The Supreme Court of Georgia has approved, even in the absence of statute, the use of the nuisance label to control alleged obscenity. However, as will be seen, this Court has not approved the validity of such procedures and, in fact, the Supreme Court has granted *certiorari* in a case questioning the validity of the Appellees' injunctive method of dealing with alleged obscenity. The case referred to is *Paris Adult Theatre I, et al. v. Slaton, et al.*, No. 71-1051, certiorari granted 408 U.S. 921, argument heard October 19, 1972. This Court is referred to the third question presented therein.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Other cases in which State Court injunctive procedures have been reviewed by appellate courts almost invariably involve specific named publications or films which were before the Courts and adjudged obscene after hearing. Cf., *McKinney v. Alabama,* 254 So. 2d 714 (1971), *cert. denied* 405 U.S. 1075 (1972) [six (6) named magazines]; *State ex rel. Keating v. "Viven"*, 272 N.E. 2d 137, *pet. for cert. pending* in U.S. Supreme Court, No. 71-599, since January 29, 1971 [one (1) named film]; *Evans Theatre Corp. v.*

Slaton, 227 Ga. 377, *cert. denied* 404 U.S. 905 [the film "I Am Curious – Yellow", appeal from temporary restraining order]; *Art Theatre Guild, Inc. v. Rhodes*, 469 S.W. 2d 669 (Tenn. 1971), *pet. for cert. pending* in U.S. Supreme Court, No. 71-515, since October 9, 1971 [the film "Without a Stitch"]; *Paris Follies, Inc. v. State ex rel. Gerstein*, 259 So. 2d 532 (3rd Dist. App. Fla., 1972), Trial Court reversed in part, injunction against showing of "pornographic movies" reversed as overbroad [two (2) named films]; *For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So. 2d 912 (1st. Dist. App. Fla., 1972), appeal pending, Florida Supreme Court [eleven (11) specific items]; *Mitchum v. Florida*, 251 So. 2d 298 (1st Dist. App. Fla., 1972), appeal pending, Florida Supreme Court, [225 exhibits stipulated to be representative]; *Marks v. City of Newport, Ky.*, _____ S.W. 2d _____ (Ky. Ct. App. 1972), Court enjoined "any obscene matter", including the five named publications), *pet. for cert. pending* in U.S. Supreme Court, No. 71-884, since October 1, 1972, with the prayer by Defendants herein that the Harem Bookstore be made to close its doors entirely and sell nothing at all, whether obscene or whether protected by the *First* and *Fourteenth Amendments*.

It should be noted that the Florida statute involved in all of the Florida cases cited above with the exception of *Paris Follies, Inc. v. State ex rel. Gerstein, supra*, has been declared unconstitutional by a Three-Judge Court in *Meyer v. Austin*, 319 F. Supp. 457 (1970), appeal pending *sub. nom., Austin v. Meyer*, No. 70-35, stay vacated June 26, 1972, _____ U.S. _____, 33 L.Ed. 2d 330.

From the foregoing, it can be said that in only a few cases has the dissemination of presumptively protected

materials been enjoined by a final judicial decision, when the specific materials enjoined had not first been declared obscene after a full judicial hearing, accompanied by appropriate judicial safeguards. Those isolated cases that do not are clearly erroneous under the reasoning of *Near v. Minnesota, supra; Organization for a Better Austin v. Keefe, supra; Mitchum v. Florida ex rel. Schaub, supra; New Riviera Art Theatre v. State, supra, Kingsley Books, Inc. v. Brown, supra; Blount v. Rizzi, supra,* and other cases cited hereinbefore.

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a bookstore provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a hearing on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Plaintiffs

v.

LEWIS R. SLATON, In his Capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his Capacity as Solicitor, Criminal Court of Fulton County,
Defendants

CIVIL ACTION NO. 17075

Before MORGAN, Circuit Judge, and MOYE and O'KELLEY, District Judges

MOYE, District Judge:

OPINION AND ORDER

Plaintiffs operate an establishment in Atlanta, Georgia, known as the Harem Bookstore. On August 23, 1972, pursuant to recently enacted Georgia statutes relating to obscenity,[1] the defendants herein brought a civil suit in the Georgia state courts to abate the Harem Bookstore as a public

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[1] Ga. Code Ann. §§ 26-2101, *et seq.* (1972).

nuisance.[2] On the same day the state court ordered plaintiffs herein to show cause why their bookstore should not be abated as a public nuisance, they brought this suit in federal court alleging that the materials sold in their bookstore were protected by the First Amendment and the attempt to abate their bookstore as a public nuisance was unconstitutional.[3] Plaintiffs challenged the constitutionality of the Georgia statutes as written and as applied and requested this Court to intervene in the state court proceedings and enjoin further use of the allegedly unconstitutional Georgia statutes. Since that time the state court suit has been stayed pending the outcome of this request for federal intervention.

The propriety of federal intervention in state court proceedings has been the subject of numerous recent Supreme Court and Fifth Circuit opinions. New guidelines for federal intervention in state court *criminal* proceedings were established by the Supreme Court in *Younger v. Harris*[4] and its companion cases.[5] But *Younger* specifically declined to

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[2] Civil proceedings to abate the bookstore as a public nuisance are authorized by the combined useage of § 26-2013 and § 72-202 of the Georgia Code. Section 26-2103 declares: "The use of any premises in violation of any of the provisions of this Chapter (relating to obscenity) shall constitute a public nuisance." Section 72-202 provides that the petition to abate a public nuisance "must proceed for the public on information filed by the solicitor general of the circuit." Thus, Georgia provides a method for civil enforcement of its criminal statutes relating to obscenity.

[3] Plaintiffs have properly asserted federal jurisdiction under 28 U.S.C.A. § 1343(3) based on a cause of action under 42 U.S.C.A. § 1983 and requested a three-judge court be convened pursuant to 28 U.S.C.A. §§ 2281 and 2284.

[4] 401 U. S. 37 (1970). The Court held "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it" and federal courts should not intervene absent a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.* at 54.

[5] *Samuels v. Mackell*, 401 U.S. 66 (1970); *Boyle v. Landry*, 401 U.S. 77 (1970); *Perez v. Ledesma*, 401 U.S. 82 (1970); *Dyson v. Stein*, 401 U.S. 200 (1970); *Byrne v. Karalexis*, 401 U.S. 216 (1970).

extend the applicability of those standards to intervention in state court *civil* proceedings.[6]

We need not pause here to analyze how the *Younger* standards should be applied in state court civil cases because the instant case does not present that situation. The situation before this Court does not involve a request for intervention in simply a Georgia state court civil case, but instead, a state court civil proceeding used to enforce Georgia's criminal laws. The propriety of federal intervention in these circumstances has been squarely decided by the Fifth Circuit Court of Appeals in *Palaio v. McAuliffe.*[7]

Palaio involved a fact situation strikingly similar to the instant case. In *Palaio,* plaintiffs requested the federal district court to enjoin Georgia civil and criminal suits which had been brought against them under Georgia obscenity laws. The federal district court refused to intervene and the court of appeals affirmed. The only difference between *Palaio* and the instant case is that in *Palaio* the state court had already heard the entire case and rendered a decision which was affirmed by the Georgia Supreme Court when the federal district court refused to intervene. Here, the state court civil suit has not yet begun and has been stayed pending the outcome of this case. As explained below, this distinction weighs heavily in favor of non-intervention.

In affirming the district court's refusal to intervene, the court of appeals in *Palaio* held:

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[6] Justice Stewart, concurring, stated that the Court was not dealing with "the considerations that should govern a federal court when it is asked to intervene in state civil proceedings where, for various reasons, the balance might be struck differently." (401 U.S. at 55).

[7] 466 F.2d 1230 (5th Cir. 1972).

"We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement – by whatever means – of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

* * *

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws."*[8]

The instant case which we are requested to enjoin is, like *Palaio,* a state civil proceeding that is an integral part of the State of Georgia's enforcement of its criminal laws. In fact, the instant case presents an even stronger case for non-intervention than *Palaio* because the state laws which were claimed to be unconstitutional in *Palaio* had already been tested in the Georgia state courts prior to the request for intervention, while here the state law is a new statute and has not been ruled on by the Georgia state courts.

In support of *Palaio,* which was virtually a "gray horse" case, we could refer to *Mitchum v. Foster,* 407 U. S. 225 (1972), in which Chief Justice Burger, speaking for the dissent, consisting of Justices Burger, White and Blackmon [Justices Powell and Rehnquist not participating], suggested:

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[8] *Id.* at 1232-1233.

> "We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

Furthermore, plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts. Consequently, this Court holds that the Georgia state court suit has not been brought in bad faith or for purposes of harrassment and that plaintiff has failed to present any "special circumstances which would justify federal intervention.

Accordingly, the complaint is DISMISSED.[9]

This day of , 1973.

LEWIS R. MORGAN,
United States Circuit Judge

/s/ CHARLES A. MOYE, JR.,
United States District Judge

/s/ WILLIAM C. O'KELLY,
United States District Judge

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[9] In view of the above holding, it is unnecessary for the Court to rule on defendant's motion requesting the Court to abstain from hearing this case until a decision has been reached in the Georgia state courts.

O'KELLEY, District Judge, Concurring:

I agree completely with the opinion of Judge Moye in this case.

It would appear that the dissent has attempted to reach the merits of the case before deciding the threshold question, that is if it should even have the case in the first place. The dissenting opinion would imply that our brothers on the state bench are neither willing nor able to apply the First Amendment of the United States Constitution. I do not agree that that is so. If a state trial judge errs, the Supreme Court of Georgia is available to correct his error. If they both err, that is not the end of the avenue when a federal constitutional right is at stake. The Supreme Court of the United States may accept certiorari and review the case even though it has found its course there through the state court system. This is federalism.

The Seventh Circuit has applied the principle of *Younger v. Harris,* 401 U.S. 37 (1971) to civil actions. *Cousins v. Wigoda,* 463 F.2d 603, (7 Cir. 1972). More recently, the Fourth Circuit, speaking through Judge Craven, extended that principle to the civil field saying:

> "The long-standing public policy against federal court interference with state court proceedings generally means that the jurisdiction of a state court first obtained should not be interferred with by federal courts.
>
> "The 'pendency' of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is appropriate. . . . Because of the cost involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts and

> the clear obligation of state courts to decide questions arising under the United States Constitution, there is a presumption against federal interference." *Lynch v. Snepp*, _____ F.2d _____ 41 L.W. 2401 (4 Cir. 1973).

The *Lynch* case like this case dealt with a First Amendment question. The court implied that the statute at issue was possibly overbroad and imposed a prior restraint on the parties. That court felt, as does this court, that in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

In the case *sub judice*, there is a single controversy pending in a court of the State of Georgia which may be litigated and appealed to a final determination. There is no allegation of harassment or inadequate remedy in the state court machinery.

If the statute under attack is so clearly unconstituional as contended by the dissent, surely the Georgia courts will so hold. I am of the opinion that they should first have that opportunity since that statute has never been before them for consideration.

For the foregoing reasons, this court should abstain from interference in the pending litigation and I concur with the opinion and order of Judge Moye.

MORGAN, Circuit Judge, dissenting:

I must respectfully dissent from the court's decision not to intervene in the state court proceedings.

First, I feel it is necessary to set out in detail exactly what the state is seeking in this proceeding. Over a period of

time agents of the state, apparently posing as customers, bought a number of "adult" books from the Harem Bookstore in southwest Atlanta. These items constituted the core of the evidence against the bookstore and its owners. The state first sought to prosecute the owners of the Harem Bookstore in a criminal proceeding under the state's obscenity laws.[1] The trial before a jury resulted in a mistrial with the jury unable to decide whether the materials were obscene. Having failed to this degree in direct criminal prosecution, the state moved to what the majority characterizes as its "civil enforcement of its criminal laws."

The suit this court is asked to enjoin was brought by the Fulton County District Attorney in the Superior Court for Fulton County.[2] The full scope of what the state sought and felt it was entitled to under the challenged statute is best illustrated by the District Attorney's prayer in the state court nuisance action:

> (a) . . . injunctions, both temporary and permanent, against the *conduct and operation* of the Harem Bookstore . . . *by any person*; and
>
> (b) . . . an order declaring *all merchandise* on said premises, *as well as all records, supplies, equipment and fixtures* used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed. (Emphasis supplied).

It is patently obvious from a reading of this complaint that the government feels it is authorized by this statute to prohibit the sale of all literary material whatsoever at the site of this bookstore, that it is entitled to seize and destroy all literary materials now in that bookstore, whether they have ever been declared obscene or not,[3] and, finally, that they can seize and destroy all fixtures used within that bookstore, no matter what type of literary matter they are used to

display or advertise. A fair reading of this statute and its intent shows that this is indeed what the statute intends to authorize.

I find any statute authorizing such a remedy constitutionally abominable. It encourages and allows prior restraint of the first rank.[4] It is a direct impingement by the state on the precious rights of freedom of speech and freedom of press, guaranteed against state interference by the First and Fourteenth Amendments.

Acting under this statute, agents of the state could, by finding a single volume which they could successfully have declared legally obscene, seize and destroy every other book – including the Bible and the United States Constitution – which was found on the premises of the bookstore from which the legally obscene matter was obtained. Furthermore, they could enjoin permanently the operation of a bookstore at that location, no matter what type of presumptively protected First Amendment materials were to be disseminated therefrom. I can see no way that the action instituted by the District Attorney in this case and authorized by the state statute can be constitutional.

I also have a great deal of difficulty with the "civil as enforcement of criminal" rationale as applied in this case. First, I note that a criminal proceeding involving some[5] of these materials was unsuccessful. In that case the issue of whether or not the materials were obscene was to be decided by a jury and no conclusion was reached. In the instant case the issue of obscenity will be decided in an *in rem* proceeding brought in equity to abate a nuisance. Thus, certain protections are lost by the use of civil proceedings.

The most troublesome element for me, however, is the difference in effect between the criminal and the civil actions. The criminal proceeding with its attendant protections results in punishment of individuals. A civil proceeding designed only

to declare obscene and seize a certain publication only affects those publications which are adjudicated obscene in that proceeding. In those two types of cases I can agree that federal courts should eschew intervention, absent special circumstances.[6] However, I must reemphasize that the state proceeding under the statute challenged herein far exceeds in its impact on constitutionally protected rights either of the two preceding state court actions. It allows for the seizure and destruction of presumptively permitted and undeniably permitted First Amendment materials merely because they are found where an "obscene" book is found. It allows for permanent injunctive restraint *in futuro* against the dissemination by certain persons at a certain location of both presumptively protected and *undeniably* protected First Amendment materials. This difference, in effect, is crucial and it is this difference which, in my mind, also tips any blance to the position that intervention by a federal court is not only allowable, it is compelled.

It would seem to me that an adverse decision against the bookstore in state court could seriously damage these First Amendment rights despite any protections offered on appeal.[7]

The majority relies heavily on *Palaio v. McAuliffe*, 5 Cir. 1972, 466 F.2d 1230, for its decision that this court should abstain in the present case. First, I basically agree that federal courts should not intrude into state court proceedings where the only questions are whether or not the material involved is "obscene" or whether the definition of "obscenity" is constitutionally infirm. These are, of course, the only issues giving rise to the possibility of intervention by a federal court when the state court action is under a criminal statute or under a statute to declare the matter obscene and to allow seizure, as was the case in *Palaio*. I reiterate that these are not the questions in this case. We are not being asked to adjudicate the issue of obscenity or non-obscenity of the materials in question. Nor is the issue one of whether the Georgia obscenity definition is improper.[8] In fact, the full

panel at oral argument in this case rejected an attempt by the District Attorney to put these materials into evidence because it is irrelevant to the issues in this case whether or not these thirteen items were legally obscene.

While the language in *Palaio* is broad at some points, I am convinced that the court in *Palaio* did not intend to reach the situation presented in this case. It is my opinion that the statute in question completely transcends mere civil enforcement of criminal statutes when it includes the seizure and destruction of *protected* First Amendment materials which cannot be seized under any existing state law nor can persons offering such materials for sale be prosecuted for any criminal act; furthermore, there is no criminal law against operation of a bookstore nor can persons be criminally prosecuted for seeking to operate a bookstore in the future. Therefore, the state is not merely enforcing otherwise valid criminal laws through civil proceedings, it has in effect exceeded the bounds of criminal law by achieving a result under civil laws which it unquestionably could not have achieved under criminal statutes.[9]

Furthermore, even if I felt that the "civil as basically an enforcement of criminal law" rationale of *Palaio* were applicable to this case, I would still not feel that abstention was required. In a passage from *Palaio* quoted by the majority opinion in this case, the Fifth Circuit acknowledged that special circumstances could well justify intervention. This is, of course, a repetition of the basic test for intervention in criminal cases which was set out by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). The special circumstances found to exist in that case were harassment by the state prosecutorial authorities and repeated threats of prosecution made in bad faith. In *Younger*, however, the Supreme Court took pains to point out that the special circumstances in *Younger* were not the only special circumstances which could ever be found and recognized that

other compelling reasons for intervention could exist. The Court directly pointed out one example wherein intervention would be proper:

> For example, as long ago as the Buck case, supra, we indicated "it is, of course, conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it." 313 U.S., at 402. 401 U.S., at 53-54.

I feel that the dangers from nonintervention in this case and the way this statute is written give sufficient justification for federal intervention on the grounds of special circumstances. It is not the issue of obscenity or non-obscenity of these materials nor the question of the constitutionality of the Georgia definition of "obscene" which compels intervention. Rather, this statute directly impinges on the right to disseminate unquestionably protected First Amendment materials and I cannot perceive any reasonable construction of the statute which would save it from invalidity.[10]

It is my opinion that a state can never enjoin the future operation of a store which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold in that store in the past. Even if every item in that store were to be held legally obscene, I do not think that an injunction against any future sale of any literary material whatsoever at that site or by the proprietors could ever be held constitutional. In passing, I note again that the state's agents admitted that not all of the material currently in the Harem Bookstore is legally obscene. Therefore, allowing closure of this store as a public nuisance would prohibit the sale of protected First Amendment materials. The state does not challenge this statement.

Furthermore, it is my opinion that the state can never confiscate and destroy protected First Amendment materials no matter where they are found. Part of the remedy which the statute encompasses in the abatement context allows seizure of all literary material and fixtures found in the bookstore. This would unquestionably allow the state to seize and destroy as contraband protected materials and this is, indeed, the position which the state has taken in the state court proceeding we are asked to enjoin. I do not feel that where First Amendment materials are concerned the state has any right to seize and destroy protected materials merely because they are found in conjunction with unprotected ones. I do not believe the First Amendment allows such state action even as a penalty of forfeiture. I reject an analogy to confiscation of automobiles hauling non-taxpaid whiskey because of the special protection afforded First Amendment materials.

The statute itself is simple and straightforward. It defines any business wherein certain unprotected materials are found, those obscene under the criminal definition, as a public nuisance, subject to abatement. It is my view that there is no way to construe abatement of a public nuisance to avoid the constitutional infirmity I have set forth above. While the Georgia court might construe the statute narrowly to avoid the problem of seizing and destroying unquestionably protected First Amendment materials, I can see no way that the problem of closing the store or forcing it to cease operation as a bookstore can be read out of abatement of a public nuisance. The most which a state can do, in my opinion, is to bring prosecution under its criminal laws or bring specific actions for declaration of obscenity of specific materials, thus subjecting that to seizure and destruction. In that I feel this statute clearly goes beyond that, I can find no saving construction.[11]

Use of this nuisance procedure is an attempt by the state to avoid what it feels are difficulties in the two methods

currently available to the state in its battle with those who disseminate what it feels are undesirable literary materials. I feel that the existing methods, despite some problems, are fully adequate for protecting the state's interest without unduly trampling First Amendment rights. The state, however, apparently feels that available measures are too restrictive and has opted in this statute for a blanket approach which will "rid them of the vermin" in one fell swoop. Criminal prosecutions are difficult with the requirements of a unanimous jury verdict based on evidence beyond a reasonable doubt. Civil actions to determine specific materials obscene are difficult because they require a book by book determination of obscenity. The nuisance approach, however, allows the state to close down and totally eliminate the stores altogether upon the finding of a single legally obscene volume. This avoids the aforementioned difficulties inherent in the other proceedings.

I feel that the Supreme Court of the State of Georgia may have already approved of the use of the public nuisance approach to closing down activities involving "obscene" materials. In *Evans Theatre Corporation v. Slaton*, 227 Ga. 337 (1971), prior to the passage of the statute challenged herein, the Georgia Supreme Court stated that where dealing with allegedly obscene materials equity may act to enjoin an existing or threatened public nuisance. At oral argument the representatives of the state admitted that the challenged code section was drafted with reliance on this decision. While the *Evans* case is distinguishable because it involved showing of a film, in light of previous decisions in the area of obscene materials and freedom of speech and the press by the Georgia Supreme Court, I see no reason to delay the invalidation by this court of a statute which I feel is totally unconstitutional.

I also feel that there is directly threatened irreparable injury both in the pecuniary damage to which these plaintiffs are subjected and the potentially tremendous "chilling" effect of prosecutions under this statute with regard to others. While

these alone might not always justify intervention, when they are combined with the clear danger to undeniably protected materials which is so obviously present in this case, the balance is then tipped toward intervention. Once the Younger-Palaio problem is resolved, all other arguments for non-intervention seem to pale in light of the threatened harm to constitutionally protected rights.[1 2]

In summary, it is my opinion that the issue of the legal theory of abatement of a public nuisance as envisioned by Georgia Code Annotated, Title 26, Section 2103, providing: "The use of any premises in violation of any of the provisions of this chapter [relating to obscene materials] shall constitute a public nuisance", and the state's attempted means of abatement can never be constitutionally permissible under any reasonable construction of that statute because it would directly and admittedly impinge the sale of constitutionally protected matter. It cannot be limited to apply only to circumstances where the abatement is only of materials adjudicated obscene and still retain any viable meaning. Therefore, any reasonable basis for this statute's existence and for the terminology it contains, the statute must be intended to do exactly what the state alleges it gives them authority to do, at least with regard to closing the premises and enjoining future bookstore sales. I simply see no way that this statute can avoid conflict with the First Amendment as made applicable against the states by the Fourteenth Amendment, and, as stated above, I see no reason for abstention.

FOOTNOTES:

[1] 26 Ga. Code 2101-2104. These statutes were declared constitutional for criminal proceedings in *Gable v. Jenkins*, 309 F.Supp. 998 (N.D.Ga. 1969). These statutes are incorporated by reference in the "nuisance" statute here under attack.

[2] The statutes involved are 26-2103, herein challenged, and 72-202, the basic nuisance abatement statute.

[3] In the verification of its compliant in state court, the state admits that not all the materials which it seeks to seize are "legally obscene". It takes the position, however, that it has the right to seize these materials also.

[4] I find the prior restraint aspects in the issuance of an injunction prohibiting future operation of a bookstore. I do not believe the state can prohibit the dissemination of literary materials *in futuro* when the nature of such materials cannot be determined. Cf. *Near v. Minnesota*, 283 U.S. 697 (1931).

[5] There was a dispute as to whether all the materials purchased by the state were involved in the prosecution which ended in a hung jury, but it is clear several of them were.

[6] There is still one troubling problem with the "civil as criminal" rationale. In a criminal case, a defendant will always be guaranteed that a federal court will be available for full consideration of his constitutional claim, for even if certiorari is denied, he may still present his claim through *habeas corpus*. However, this is not an available remedy in a civil case so that failure to intervene will prevent consideration of the constitutional claims by a federal court unless certiorari is granted.

[7] First, an adverse decision by the trial court could lead to an immediate seizure and destruction or materials found in the bookstore, whether or not protected, unless some state court granted a stay pending appeal. Furthermore, because of the tremendous financial loss which could be occasioned by the finding of one "obscene" book on the premises of a bookstore the mere fact that this law might be used and that prosecutions are indeed being sought under it, could have, as I see it, an extremely serious "chilling effect" on guaranteed First Amendment freedoms. This point is elaborated *infra*.

[8]The plaintiffs attempt to challenge the underlying statutes arguing that *Gable v. Jenkins, supra,* did not include a challenge on the grounds they now raise. Because of my feelings on the nuisance statute itself, I do not reach this issue.

[9]The Challenge to the statute in the instant case is really more than a mere claim of vagueness or overbreadth. The state is asserting that under certain circumstances, not within those currently well-recognized, e.g., "clear and present danger", interfere with the distribution of admittedly protected literary materials. Thus, this is a case which goes further than merely requiring statutory construction.

[10]The majority points out as another reason for envoking abstention that this is a recent statute which has todate not been construed by the Georgia courts. In discussing my position that no construction of the statute could be constitutional, I set forth two reasons why I feel awaiting a state court interpretation of the statute would be futile. First, as noted, I cannot perceive any construction of the statute which will save it and, secondly, I feel that we already have a sufficient indication of the Georgia Supreme Court's position on this issue which illustrates the futility of awaiting a new construction from that Court.

[11]To hold that the statute only allows seizure of materials already adjudicated obscene would be to make the statute useless since the state already has that power.

[12]I can only point to the complete and cogent evaluation of abstention when First Amendment values are involved, set forth by Judge Irving Goldsberg of the Fifth Circuit in *Hobbs v. Thompson,* 1971, 448 F.2d 456. This excellent analysis points up the need for swift action in the federal courts to ensure adequate protection of the freedoms of speech and the press. In my mind it settles all other issues about abstention in this case.

APPENDIX B

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Final Order denying Plaintiffs' application for interlocutory injunction and dismissal of the Complaint and Petition for Injunction and Declaratory Judgment, said Order of denial and dismissal having been entered i this action on February 22, 1973.

This appeal is taken pursuant to *Title 28 U.S.C.* §*1253.*

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APPENDIX C

FIRST, FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, and Georgia Code §§ 26-2101, 26-2103 and 26-2104 and Title 72, Code of Georgia of 1933, as amended.

FIRST AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED

26-2101

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section of the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall be for the first offense be punished as for a

misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

26-2103

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

26-2104

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

TITLE 72, Code of Georgia of 1933, as amended.

Chap. 72-1 IN GENERAL.

72-101. (4457) **Definition in general.**—A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

72-102. (4454) **Classes; public and private; definitions.**—Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

72-103. (4454, 4455) **Right of action to individual for public nuisance.**—Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not

participate, such special damage shall give a right of action.

72-104. (4454, 4456) **Right of action to one injured in person or property.**—A private nuisance may injure either the person or property, or both, and in either case a right of action accrues to the person injured or damaged.

72-105. (4458) **Right of alienee of property injured. Liability of alienee of property causing nuisance.**—The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action brought.

Chap. 72-2 ABATEMENT

72-201. (5329) **Manner of abatement.**—Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county o; his deputy. (Acts 1833, Cobb, 817.)

72-202. (5330, 5338) **Public nuisance, how restrained.**—Private citizens may not generally interfere to have a public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

72-203. (5338) **Private nuisance; application by person injured for abatement.**—A private nuisance may be abated on the application of the person injured. (76 Ga. 806.)

72-204. (4459) **Injunction where consequences irreparable in damages.**—Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a

reasonable degree certain, equity may interfere to arrest a nuisance before it is completed.

72-205. (5333) **Grist or sawmill or other water machinery; manner of abatement.**– If the nuisance complained of is a grist or sawmill, or other valuable water machinery, the same shall not be destroyed or abated except upon the affidavit of two or more freeholders, before the ordinary of the county in which the nuisance complained of exists, testifying that the health of the neighborhood, according to their opinion and belief, is materially injured by such milldam, or other obstruction to a watercourse by other machinery, as may be complained of; whereupon it shall be the duty of such ordinary, as soon as practicable, to cause a jury of 12 men to be summoned by the sheriff or his deputy, for the trial of the cause, who, together with the said court, shall attend at the courthouse of said county to adjudge the case of nuisance complained of; and all parties shall have a reasonable time allowed them to summon their witnesses and procure their attendance. (Act 1833, Cobb, 817, Acts 1874, p. 21.)

72-206. (5334) **Same; how jury obtained in abatement proceeding.**- In all cases of nuisance, when the nuisance complained of is a grist or sawmill, or other valuable water machinery, and application has been made to have such nuisance abated as is provided for in section 72-205, it shall be the duty of the ordinary of the county to take from the jury list of file in the clerk's office of the superior court of said county 100 names, to be written on separate pieces of paper and placed by him in a box, and from said box he shall draw 24 jurors, and make out a list of the jurors so drawn and deliver a copy thereof to the sheriff or his deputy, who shall summon said jurors at least two days before the time set for the hearing of said case, in the same manner that jurors are summoned in the superior court; said jurors so summoned shall attend at the courthouse of said county at the time specified in said summons; and if any of said jurors shall be disqualified from serving for any legal cause, it shall be the duty of the sheriff or his deputy, under direction of said

ordinary, to summon a sufficient number of tales jurors to complete the panel of 24, and from said panel a jury of 12 shall be stricken, the parties plaintiff and defendant having six strikes each; and the persons serving under this section shall be entitled to the same per diem allowed jurors in the superior court of the county where such trial is had. (Acts 1875, pp. 24, 25; 1882-3, p. 71.)

72-207. (5339) **Same; fees of ordinaries, witnesses, and jury.**— When it may become necessary for the ordinary, or other tribunal authorized by this Code so to do, to cause a jury to be summoned and impaneled to try a cause of nuisance arising from water machinery, milldam, or otherwise, the ordinary, witnesses, and jurors shall be allowed such fees in said causes as are allowed by law in like cases in superior courts. (Act 1837, Cobb, 361.)

72-208. (5340) **Same; compensation for removing nuisance.**— The sheriff, or other officer, when acting under the order of said ordinary, or other tribunal, shall remove any nuisance, machinery, or milldam, for which he shall be allowed such compensation as is prescribed in section 24-2823. (Act 1837, Cobb, 361, Acts 1871-2, p. 51.)

Chap. 72-3. HOUSES OF PROSTITUTION.

72-301. **Houses and contents declared a nuisance.**— Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

72-302. **Action to enjoin nuisance, how and by whom brought; temporary injunction.**— Whenever a nuisance is kept,

maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

72-303. **Notice of hearing on application.**– Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

72-304. **Injunction binding throughout judicial district. Contempt.**– When an injunction shall have been granted it shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

72-305. **Trial; time; evidence of reputation of place.**– The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

72-306. **Dismissal of complaint. When solicitor or citizen may be substituted for complaining party.**– If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the solicitor general in writing or in

open court. If the court shall be of the opinion that the action ought not to be dismissed, he may direct the solicitor general to prosecute said action to judgment, and if the action shall be continued more than one term of court, any citizen of the county or the solicitor general may be substituted for the complaining party and prosecute said action to judgment. (Acts 1917, p. 179.)

72-307. **Costs, to whom taxed.**– If the action shall be brought by a citizen and the court shall find that there was no reasonable ground or cause for said action, the cost may be taxed to such citizen. (Acts 1917, p. 179.)

72-308. **Violation of injunction; punishment for contempt; proceedings.**– In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

72-309. **Abatement, order of; contempt of court; fees for removing and selling property.**– If the existence of the nuisance shall be established in an action as provided in this Chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall

break and enter or use a building, structure, or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

72-310. **Proceeds of sales.**– The proceeds of the sale of the personal property, as provided in the preceding sections, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Acts 1917, p. 180.)

72-311. **Bond to abate; release of property.**– If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

72-312. **Permanent injunction; money judgment; lien.**– Whenever a permanent injunction issues against any person for maintaining a nuisance as herein described, or against any owner of the building knowingly kept or used for the purposes prohibited by this Chapter, the judge granting said injunction shall, at the same time, enter up judgment against the person, firm or corporation owning said building in the

sum of $300, and said judgment shall be a special lien upon the premises, and the furniture and fixtures therein, complained of, and shall as against said property rank from date with all other judgments or liens as now provided for by law. Said judgment shall issue in the name of the State, and be enforced as other judgments in this State: Provided, that the lien of the judgment herein provided for upon said property, real and personal, used for the purpose of maintaining said nuisance, shall not relieve the person or building from any of the other penalties provided by law. All sums arising from the enforcement of the judgments in this section referred to shall be paid into the treasury of the county in which said judgment is rendered and become part of the general funds of said county. (Acts 1917, p. 181.)

Chap. 72-4. NUISANCES IN CITIES.

72-401. (5331) **Manner of abatement; jurisdiction of police court.**— If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city, whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817, Acts 1892, p. 64.)

72-402. (5332) **Notice of meeting to determine question of abatement.**— Reasonable notice shall be given to the parties interested of the time and place of the meeting of such mayor, intendant, aldermen, wardens, council, or commissioners. (Act 1833, Cobb, 817.)

72-9901. (681 P.C.) **What nuisances are indictable.**– Any person who shall erect or continue after notice to abate, a nuisance which tends to annoy the community, to injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor. (Act 1833, Cobb, 817.)